

Kenknight, Jeff

From: Cool.Richard@epamail.epa.gov
Sent: Friday, February 15, 2013 12:37 PM
Subject: Fw: Seward Coal Loading Facility - EPA 1987 Dive Report
Attachments: ATTIR0SJ.pdf

(See attached file: EPA Dive Report Exhibit B Part 2.pdf)

FYI, Mr. Maddox' earlier email did not include the dive survey. Here it is.

----- Forwarded by Richard Cool/R10/USEPA/US on 02/15/2013 12:34 PM -----

From: Russ Maddox <russtmaddox@Exemption 6>
To: Richard Cool/R10/USEPA/US@EPA,
Date: 02/15/2013 12:28 PM
Subject: Re: Seward Coal Loading Facility - EPA Dive Report

Hi Rick,

Sorry about that.

Regards, Russ

From: "Cool.Richard@epamail.epa.gov" <Cool.Richard@epamail.epa.gov>
To: russtmaddox@Exemption 6
Cc: Ryan.Kristin@epamail.epa.gov; Duncan.Bruce@epamail.epa.gov
Sent: Friday, February 15, 2013 11:05 AM
Subject: Seward Coal Loading Facility - EPA Dive Report

Mr. Maddox:

I am contacting you in regard to the attachment captioned "EPA dive report" in your Wednesday February 13 email below.

It appears that the dive survey is not a part of that particular pdf. I would appreciate it if you could review the attachment and related court filings and if available, forward a copy to me of the dive report for the May 27, 1987 dive.

The attached pdf consists of four (4) pages including the one page cover letter that refers to copies of both the compliance inspection report and the dive report for the May 27, 1987 dive.

The federal court's electronic filing notation indicates that Document 121-3 was a four page document, consisting of the cover letter, the 3560 form and the two page inspection report. However, there is also a notation for an Exhibit B consisting of eight (8) pages. I suspect the dive report might be the last four pages of Exhibit B and may be a separate electronic filed document in the court records.

Thank you for any additional information you can provide on the dive survey itself. I am copying Dr. Duncan in

case he might have access to any historic dive survey documents from 1987 that he could share with the program units.

Please call me if any questions. Thank you for your help.

Rick Cool
NPDES Compliance Unit
US EPA Region 10
1200 Sixth Avenue, Suite 900, OCE-133
Seattle, WA 98101

Phone: (206) 553-6223

Fax: (206) 553-1280

----- Forwarded by Dianne Soderlund/R10/USEPA/US on 02/14/2013 03:06 PM -----

From: Russ Maddox <russmaddox@Exemption 6>
To: Dianne Soderlund/R10/USEPA/US@EPA
Date: 02/14/2013 06:58 AM
Subject: EPA Dive Report attached

----- Forwarded Message -----

From: Russ Maddox <russmaddox@Exemption 6>
To: "Soderlund.Dianne@epamail.epa.gov" <Soderlund.Dianne@epamail.epa.gov>; Kristin Ryan <Ryan.Kristin@epamail.epa.gov>
Sent: Wednesday, February 13, 2013 4:28 PM
Subject: Seward Coal Loading Facility

Hi Diane and Kristin,

I wanted to follow up about the recently unearthed dive report and the state's troubling interpretation of the Clean Water Act and offer a some actions for you to consider taking to help amend the situation..

The Seward Coal Loading Facility operates under a Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity. That permit and the facility's authorization under it were originally issued by you, and are now administered by the state. The facility does not have a permit that authorizes the direct discharge of coal into Resurrection Bay, including discharges from the conveyor and ship loader that extend over Resurrection bay.

The facility is arguing in Federal District Court that the Stormwater General Permit authorizes the non-stormwater discharge of coal into the bay, including discharges that occur outside of precipitation events. These discharges are not identified as authorized discharges in the Stormwater General Permit. However, the facility is arguing that the Stormwater Permit shields them from any challenge for discharging non-stormwater without a permit. The facility is further arguing that because EPA was aware of the non-stormwater discharges (as purportedly indicated by a 1987 EPA dive report that found coal in Resurrection Bay under the conveyor), the facility is shielded from any challenge.

Alaska DEC's Deputy Commissioner provided a declaration in the Seward case in support of the facility's arguments that the facility does not need a permit for direct discharges because they have a Stormwater Permit. I am attaching both the Defendant's brief and the declaration from DEC's Deputy Commissioner. DEC's opinion that a Stormwater Permit provides a shield for non-stormwater discharges is counter to the requirements of the CWA. DEC and the facility are attempting to extend the permit shield doctrine to cover discharges that have not previously been covered under the permit shield doctrine.

Action by EPA that clarifies the intent of the CWA, the requirements of Section 402, and the limited scope of the permit shield would help achieve the proper result in the Seward case, and would limit DEC's attempts to expand the permit

shield. If EPA can respond with haste, for example by submitting a letter to DEC clarifying the limited scope of the permit shield, it could influence this case prior to the judge reaching a finding on summary judgment. Oral argument on cross motions for summary judgment is scheduled for March 6. If the judge rules in the facility's and DEC's favor on the permit shield question, we will seek additional EPA involvement to avoid a dangerous precedent drastically expanding the scope of the permit shield.

I really appreciate you both taking time to consider this situation. Please share this with Dennis McClerran, too. Thanks for all of your efforts on behalf of our environment.

Regards, Russ

(See attached file: EPA dive report.pdf)